**TAN KIAW**

**v.**

**GAN CHYE KHOON**

FEDERAL COURT, JOHOR BAHRU
SALLEH ABAS CJ (MALAYA)
WAN SULEIMAN FJ,
GEORGE SEAH FJ
[CIVIL APPEAL NO. 48 OF 1982]
21 APRIL 1983

***LAND LAW:*** *Lease - Estoppel - Whether appellant estopped - Nature of agreement - Whether lease or tenancy - Agreement with two persons - Whether as trustees - Section 225(2) National Land Code - Notice to quit - Relevance - Application of O. 8 r. 10, Subordinate Courts Rules 1980.*

The appellant obtained an order for possession of shop premises in Segamat, Johor against one Lim Ah Lek ('Lim') and one Taplil bin Ithnain ('Taplil') together with mesne profits. A writ of possession was executed and the respondent, who was occupying the shop premises at the material times, was evicted therefrom.

The respondent then took out a writ of summons in the High Court against the appellant, claiming for a declaration that he had been and was still a tenant of the premises and for certain reliefs, including damages for wrongful eviction and an interim injunction against the appellant.

Certain facts, including the following, were admitted by the parties. In 1977 the appellant entered into a tenancy agreement with Lim and Taplil. Later in 1977 a rubber dealers' business under the name of Hwa Mah Rubber Trading was carried on at the premises. Lim, Taplil and the respondent were partners. The business premises licence was issued to Lim and Taplil but was later issued to the respondent and Taplil. Rents paid to the appellant were acknowledged on vouchers bearing the name "Hwa Mah Rubber Trading". Notice to quit was served on the expiration of the tenancy in 1980 but on Hwa Mah Rubber Trading still carrying on business at the premises, the appellant brought an action for possession, and as stated above, an order for possession was made and writ of possession executed.

The Judicial Commissioner allowed the claims. The appellant appealed.

**Held:**

**[1]** The appellant was not estopped from denying the respondent's tenancy. It had rightly been conceded by the respondent that the tenancy of the premises was not granted to Syarikat Hwa Mah Rubber Trading and that the appellant had not accepted the respondent as a tenant. [*Alagappa Chettiar v. Coliseum Cafe* [1962] MLJ 111 distinguished].

**[2]** The provisions s. 225(2) National Land Code, which applied to a "registered lease" or a "tenancy in excess of three years" had no application to the facts of the case, as the tenancy between the appellant and Lim and Taplil had been a tenancy for three years only.

**[3]** Notice to quit was not required to be served on the respondent who had never been a tenant of the appellant. Nor did the firm of which he was a manager have any interest in the premises. Furthermore, the respondent ought to have applied under O. 8 r. 10 to be included as a party, but had not done so until late in the proceedings, when his application had been rightly rejected.

*[Appeal allowed.]*

**Case referred to:**
*Alagappa Chettiar v. Coliseum Cafe [1962] MLJ 111*

**Legislation referred to:**
National Land Code 1965, ss. 5, 213(1), 223, 225(2)
Subordinate Courts Rules 1980, O. 8 r. 10, O. 30 r. 3, (3), O. 31 r. 4

*For the appellant - C.C. Aiyathurai; M/s. C.C. Aiyathurai & Co.*
*For the respondent - K.S. Dass; M/s. Wong & Dass*

**JUDGMENT**

**George Seah FJ:**

In the Magistrate's Court at Segamat, Johor on 14 January 1981, the present appellant, Tan Kiaw (f) obtained an order for possession of shop premises knows as No. 4, Taman Jementah, Segamat, Johor against (1) Lim Ah Lek and (2) Taplil bin Ithnain together with mesne profits at the rate of RM240 per month from 1 March 1980 till possession is delivered up to the appellant, and costs fixed at RM504. Since no appeal was lodged after the expiration of the appeal period, application was granted to the appellant to issue a writ of Possession. The writ was executed on 12 August 1981 by the Court Bailiff and the present respondent, Gan Chye Khoon, who was occupying the shop premises at the material times, was evicted therefrom.

On 2 September 1981 the present respondent (plaintiff in the Court below) took out a writ of summons in the High Court at Muar, Johor against the present appellant (defendant in the Court below) claiming for the following reliefs:

(a) A declaration that the plaintiff was and is still a tenant of the premises No. 4, Taman Jementah, Segamat, Johor.

(b) Damages for wrongful eviction from premises No. 4, Taman Jementah, Segamat, Johor.

(c) An interim injunction to restrain the defendant whether by herself and/or by her agent or servant from entering into possession, occupying or remaining thereof, leasing or subletting, the premises No. 4, Taman Jementah, Segamat, Johor and/or interfering with the quiet enjoyment of the plaintiff's tenancy.

(d) That all proceedings in Segamat Magistrate's Court be stayed pending the disposal of this suit.

(e) Costs.

(f) Such further or other relief as the nature of the case may require.

And the undermentioned order was made by the learned Judicial Commissioner on 18 February 1982:

> ... It is ordered that the plaintiff was and is the tenant of the premises No. 4, Taman Jementah, Segamat, Johor and the plaintiff be restored to possession of the said premises No. 4, Taman Jementah, Segamat, Johor and that the defendant whether by herself and/or her agent or servant be restrained from entering into possession, occupying or remaining thereof, leasing, subletting the said premises No. 4, Taman Jementah, Segamat, Johor and/or interfering with the quiet enjoyment of the plaintiff's tenancy AND IT IS ALSO ORDERED that the damages suffered by the plaintiff for wrongful eviction from the premises No. 4, Taman Jementah, Segamat, Johor be assessed by the Senior Assistant Registrar of the High Court, Muar, Johor AND IT IS FURTHER ORDERED that the defendant do pay the plaintiff the taxed costs of this action AND IT IS LASTLY ORDERED that upon the plaintiff entering into possession

of the premises No. 4, Taman Jementah, Segamat, Johor shall pay to the defendant the sum of RM3,720 on or before 28 February 1982 and a further sum of RM3,000 to be paid into the High Court Muar, Johor on or before 30 March 1982 and the monthly rental of RM140 to be paid to the defendant with a further sum of RM140 to be paid monthly into the High Court, Muar, Johor pending the disposal of the appeal to the Federal Court to be filed by the defendant.

At the hearing of the suit at Muar High Court, the following statement of facts were admitted by the parties, viz:

(i) Tan Kiaw (hereinafter referred to the defendant herein) is the owner and landlady of premises known as No. 4 Taman Jementah, Segamat, Johor (hereinafter referred to as the said premises).

(ii) On 12 March 1977, Tan Kiaw (the defendant herein) entered into a tenancy agreement with Taplil bin Ithnain and Lim Ah Lek in respect of the said premises.

(iii) Later in the same year 1977 between July and October, a rubber dealers business under the name and style of Hwa Mah Rubber Trading carried on business at the said premises.

(iv) The rubber dealers licence to carry on business at the said premises vide Licence No. A/10/5923/77 was issued in the names of Taplil bin Ithnain and Lim Ah Lek.

(v) The Business Registration of the firm trading under the name and style of Hwa Mah Rubber Trading had the following partners as from 1 January 1977; Gan Chye Khoon, Lim Ah Lek and Taplil bin Ithnain.

(vi) By the Business Registration of Hwa Mah Rubber Trading, the said firm changed its place of business to the said premises on 4 October 1977.

(vii) (a) Lim Ah Lek withdrew from the said firm on 15 December 1977.

(b) The licence to do business as rubber dealers was later issued in the name of Gan Chye Khoon (the plaintiff herein) and Taplil bin Ithnain and the renewed licence for the year 1978 was Licence No. A/01/1415/78. The original licence number issued to Lim Ah Lek and Taplil bin Ithnain is also recorded in the renewed licence.

(viii) All rents paid to the defendant herein were when acknowledged, were acknowledged on the vouchers bearing the name Hwa Mah Rubber Trading.

(ix) The tenancy agreement dated 12 March 1977 between the defendant herein and Taplil bin Ithnain and Lim Ah Lek expired on 28 February 1980. Taplil bin Ithnain and Lim Ah Lek were given a notice to quit by letter dated 3 March 1980.

(x) There was no other response from Taplil bin Ithnain or Lim Ah Lek to the defendant herein to the Notice to Quit.

(xi) Hwa Mah Rubber Trading still carried on business at the said premises after expiry of the Notice to Quit.

(xii) (a) The defendant herein issued a summons vide Civil Action No. 101 of 1980 against Taplil bin Ithnain and Lim Ah Lek on 20 April 1980 for vacant possession of the said premises.

(b) The summons was served on Lim Ah Lek on 8 June 1980 and Taplil bin Ithnain as second defendant on 1 July 1980.

(c) The Civil Action came up for hearing on 19 November 1980 and judgment was delivered on 14 May 1981 in favour of the defendant herein as plaintiff(xiii)

(a) Lim Ah Lek and Taplil bin Ithnain applied for a stay of execution for purposes of appeal. No appeal was lodged.

(b) After the maximum period of stay had lapsed a writ of possession was applied for and issued by the Segamant Magistrate's Court.

(c) The Bailiff attended to the order of Court by entering the premises in dispute and causing the defendant herein to have possession of the premises on 12 August 1981.

(d) The defendant herein pad-locked the said premises and handed the keys over to the police at their request.

The present appellant was dissatisfied with the decision of the learned Judicial Commissioner and has appealed to this Court.

It was the contention of learned Counsel for the appellant that the learned Judicial Commissioner decided the case not in accordance with the pleadings.

For the respondent it was submitted that the respondent's case in the Court below was set out in para. 4 and 7 of the statement of claim. Paragraph 4 reads:

> The defendant (appellant herein) commenced an action in Segamat Magistrate's Court vide Segamat Magistrate's Court Civil Action No. 101 of 1980 for the recovery of the possession of the said premises naming Lim Ah Lek and Taplil bin Ithnain as defendants although the defendant well knew that the plaintiff (respondent herein) was in actual possession and has been paying rent in respect of the said premises and the defendant has been receiving rent from the plaintiff.

And para. 7 reads:

> Further and in the alternative, the defendant knew at all material times that the plaintiff was the sole person responsible for the running of the business of Syarikat Hwa Mah Rubber Trading and any tenancy agreement the defendant reached with the said Lim Ah Lek and Taplil bin Ithnain was superseded by an oral agreement between the plaintiff and the defendant whereby the defendant accepted the plaintiff as the tenant and accepted rent from the plaintiff as and when the rent fell due.

At the hearing of this appeal learned Counsel for the respondent conceded (rightly in our view) that (a) the tenancy of the premises was not granted to Syarikat Hwa Mah Rubber Trading and (b) that the appellant had not accepted the respondent as a tenant of the said premises. In fact, no evidence was adduced by the respondent in the Court below to support his case as pleaded in para. 4 and 7 of the statement of claim. On the other hand, there was ample evidence from both the appellant and the respondent that the former would never accept the respondent as a tenant of the premises (see p. 65, 68, 71, 72 and 73 of the record). In this respect, the present appeal can be distinguished from the case of *Alagappa Chettiar v. Coliseum Cafe* [1962] MLJ 111, where the Court of Appeal agreed with the finding of the learned trial Judge that it was a letting by the previous landowner to the persons who for the time being were partners carrying on business under the name and style of Coliseum Cafe and Hotel and that no reliance being placed by the landowner on any particular member of the firm. In short, the landowner, did not rely on the personnel of the partners in the firm. Whereas here, the appellant, as landowner relied on the identity of Lim Ah Lek in particular when she entered into the tenancy agreement with Lim Ah Lek and Taplil bin Ithnain on 12 March 1977. The appellant made it abundantly clear that she would not accept the respondent as a tenant or one of the tenants and the respondent knew of this as a fact. In the light of this, in our judgment, the finding of the learned Judicial Commissioner that the

appellant was estopped from denying the respondent's tenancy or that the respondent was her tenant of the premises at No. 4, Taman Jementah, Segamat, Johor could not be supported.

Next, learned Counsel for the respondent relied on the provision of s. 225(2) of the National Land Code 1965 for the proposition that when Lim Ah Lek and Taplil bin Ithnain entered into the said tenancy agreement with the appellant on 12 March 1977 they must be presumed to have done so as trustees or representatives of the respondent. Section 225 reads:

225(1) The powers conferred by this Chapter shall be exercisable in any particular case subject to -

(a) any prohibition or limitation imposed by this Act or any other written law for the time being in force;

(b) any restriction in interest to which the land in question is for the time being subject; and

(c) so far as they are conferred on lessees, sub-lessees and tenants, the provisions, express or implied, of the lease, sub-lease or tenancy in question.

(2) Without prejudice to para. (a) of sub-section (1), no lease or tenancy may be granted to two or more persons or bodies otherwise than as trustees or representatives.

According to s. 5 of the National Land Code 1965 "lease" means "a registered lease or sub-lease of alienated land". There is, however, no definition of "tenancy" in s. 5 but "tenancy exempt from registration" has the meaning assigned thereto by subsection (1) of s. 213.

Section 213(1) provides that

In this Act 'tenancy exempt from registration' means -

(a) any tenancy or sub-tenancy for a term not exceeding three years granted pursuant to s. 223; and

(b) any tenancy or sub-tenancy for a term not exceeding one year granted pursuant to the provisions of any previous land law.

It seems to follow that the words "lease" or "tenancy" in subsection (2) of s. 225 means "a registered lease" or "a tenancy in excess of three years". Since the tenancy agreement dated 12 March 1977 entered into between the appellant of the one part and Lim Ah Lek and Taplil bin Ithnain of the other part was for a period of three years only commencing from 1 March 1977 to 28 February 1980 we are of the opinion that the provision of s. 225(2) of the National Land Code 1965 has no application to the facts of this case. The submission of learned Counsel for the respondent based on subsection (2) of s. 225 therefore fails.

Having regard to these findings, the learned Judicial Commissioner erred in law in holding that the respondent was and still is a tenant of the appellant in respect of premises at No. 4, Taman Jementah, Segamat, Johor, and that the appellant was estopped from denying the respondent's tenancy of the said premises.

Learned Counsel for the respondent argued that the appellant should serve the respondent with a notice to quit and should also make the respondent a party to the proceedings when action was taken for vacant possession of the shop premises at the Magistrate's Court at Segamat, Johor. We do not know on what legal basis the learned Counsel was making this submission and no authority was cited to support it. On the facts of this appeal, we are of the opinion that notice to quit need only be served on the parties to the tenancy agreement, viz. Lim Ah Lek and Taplil bin Ithnain; for the appellant had never accepted or recognised

the respondent as a tenant. The respondent was regarded by the appellant as a manager of Hwa Mah Rubber Trading which firm was allowed to carry on business in the said premises by the tenants, Lim Ah Lek and Taplil bin Ithnain, who were also co-partners in Hwa Mah Rubber Trading, during the term of the tenancy. It follows that the firm had no interest and did not acquire any interest in the premises known as No. 4, Taman Jementah, Segamat, Johor. However, O. 8 r. 10 of the Subordinate Courts Rules 1980 may be relevant and it reads as follows:

> 10 (1) Without prejudice to r. 6 and subject to the provisions of ss. 70 and 71 of the Act the Court may at any stage of the proceedings in an action for possession of immovable property order any person not a party to the action who is in possession of the immovable property (whether in actual possession or by a tenant) to be added as a defendant.
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> (2) An application by any person for an order under para. (1) must be made by notice stating the grounds of the application and supported by affidavit showing that he is in possession of the immovable property in question and if by a tenant, naming him.
>
> (3) The application must be served on the plaintiff and every defendant.
>
> (4) ...

According to the record the respondent was cross-examined about the proceedings in the Segamat Magistrate's Court and he replied that not only he had notice and knowledge of them but was present in Court during part of the hearing. If he claimed any interest in the premises at No. 4, Taman Jementah, Segamat, Johor he ought to have taken reasonable steps by applying to the Court to be included as a party to the action in addition to the named defendants, viz. Lim Ah Lek and Taplil bin Ithnain, under O. 8 r. 10 of the Subordinate Courts Rules 1980. He did nothing of the kind but sat back to wait for the outcome of the Court action. Learned Counsel for the respondent stated from the Bar that when the appellant applied to the learned Magistrate for leave to issue a writ of possession pursuant to O. 30 r. 3 and O. 31 r. 4 thereof the respondent attempted to intervene at this stage of the proceedings but the learned Magistrate disallowed him from doing so on the grounds, *inter alia*, that the respondent had received notice of the proceedings as appeared to the trial Court sufficient to enable him to apply to the Court for any relief which he may be entitled (see O. 30 r. 3(3)), and it was too late in the day to object to the application of the appellant. In our judgment, the learned Magistrate came to the correct decision having regard to the abovementioned facts.

For the above reasons, we set aside the judgment of the learned Judicial Commissioner and allow the appeal with costs here and below to be taxed. The RM500 deposit to be returned to the appellant.

Also found at [1983] 1 CLJ 292